APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18,098

REUBEN STURMAN, *Petitioner-Appellant*

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*

Order

Before EDWARDS, CELEBREZZE, and MCCREE, Circuit Judges.

Appellee has moved to dismiss this appeal from an order of the District Court refusing to quash a grand jury subpoena ordering appellant to produce certain records. Upon consideration, it is ORDERED that said appeal be, and hereby is, dismissed for the reason that the order of the District Court is not a final decision. 28 U.S.C. § 1291; *Cobbledick* v. *U.S.*, 309 U.S. 323 (1940).

Entered by order of the Court

CARL W. REUSS
Clerk

Filed: Feb. 17, 1968.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

In the Matter of REUBEN STURMAN

Oral Opinion Rendered by Hon. William K. Thomas, Judge of Said Court, on Thursday, July 20, 1967

THOMAS, J.: After several hearings on the application of Reuben Sturman for alternative orders regarding grand jury subpoenae, I am prepared to render my ruling.

Under the federal constitution and laws of the United States, the grand jury has "a broad power of investigation and inquisition," *Blair* v. *United States,* 250 U. S. 273. Its vast power of inquiry "is not to be narrowly limited by questions of propriety or forecast of probable results." *Blair, supra.*

A grand jury's power of investigation to determine probability of criminal violation is essential in a free society. It is obliged to ferret out and to pursue possible crime and at the same time through its secret proceedings to protect from unnecessary public scorn and unfair humiliation those citizens who may be investigated but who are really innocent of any crime.

A grand jury while not independent of the court is not subject to the court's directions and orders with respect to the exercise of its essential functions. *United States* v. *United States District Court,* 238 F. 2d 713. A grand jury may issue subpenas on its own decision or in conjunction with the United States Attorney. Its semiautonomous status permits it to set its own course of investigation. It is not dependent upon a court for prior approval before issuing a subpena.

Hale v. *Henkel,* 201 U. S. 43 (1906) held, among other things, that "an order for the production of books and

papers may constitute an unreasonable search and seizure within the Fourth Amendment." The opinion later stated that "a general subpena of this description is equally indefensible as a search warrant would be if couched in similar terms." A test of reasonableness must be applied. Nevertheless *Hale* did not hold, nor will its language be implied to hold that a grand jury or the United States Attorney must show probable cause to justify the materials sought in a subpena duces tecum. The fourth amendment requirements for a magistrate's issuance of a search and seizure warrant do not apply, I have concluded, to the issuance of grand jury subpenas. Not required to establish probable cause in the first instance, a grand jury cannot be compelled to supply evidence of probable cause should compliance with a subpena duces tecum be resisted by a witness. To impose such a requirement would hobble the venerable and essential investigatory powers of a grand jury. The recent decision of the United States Supreme Court cited by the applicant (Marcus, Quantity of Books, Freedman, and Bantam Books, Inc. to identify them by name) do not deal with grand jury action and are inapplicable thereto, it is concluded.

Nevertheless, a grand jury's power of subpena is not all powerful. It is not law unto itself. If excessive the exercise of the grand jury power of subpena may be curbed by a court. When compliance will be unreasonable or oppressive a subpena may be quashed or modified pursuant to a motion under Rule 17(c), Federal Rules of Criminal Procedure. The adoption of Rule 17(c) codifies and implements the power to suppress or modify a subpena originally recognized to rest on the fourth amendment, *Hale* v. *Henkel, supra.*

In re. Grand Jury Subpena Duces Tecum, 1961, 203 F. Supp. 575 (S. D. N. Y.) and cases cited therein hold that the fourth amendment's prohibition against unreasonable searches generally applies to grand jury subpenas.

The subpena must be reasonable and "reasonableness, in this context, has three components." (1) "The subpoena duces tecum may command only the production of things relevant to the investigation being pursued," (2) "The subpoena must specify the things to be produced with reasonable particularity," and (3) "The subpoena may order the production of records, covering only a reasonable period of time."

In a proceeding to suppress or modify a subpena duces tecum, the question of relevance of the material sought to the general subject of the grand jury investigation may be raised. However, as held in *Schwimmer* v. *United States,* 232 F. 2d 855, at 862 (1956):

> Relevance and materiality necessarily are terms of broader content in their use as to a grand jury investigation than in their use as to the evidence of a trial. They must be given practical meaning in relation to the functions which a grand jury is designed to serve and to the realities which are necessary in any expeditious carrying-on of its operations. Thus, a grand jury has no catalog of what books and papers exist and are involved in a situation with which it is attempting to deal, nor will it ordinarily have any basis for knowing what their character or contents immediately are. It can therefore hardly be expected to be able to designate or call for what its exact needs may ultimately turn out to be.

The opinion continues with this guideline:

> And since the path which it is entitled to travel in its search for probable cause has no general limits except those of reasonableness on the entirety of the situation being pursued, it obviously has a right, as against the objection of unreasonable search and seizure, to a fair margin of reach and material in seeking

> information, not merely direct but also as a matter of possible light on seemingly related aspects whose significance it is seeking to uncover. Some exploration or fishing necessarily is inherent and entitled to exist in all documentary productions sought by a grand jury.

In light of these governing principles, consideration of the application for alternative orders re: Grand Jury subpenas turns to the relevance of the materials sought by the subpenas to a possible area of grand jury inquiry. In his brief opposing the application to quash, the United States Attorney has generally revealed the scope of the contemplated grand jury inquest. His brief states:

> The purpose of the present inquiry is the investigation of the mailing and interstate transportation of obscene materials in violation of Sections 1461 and 1462 of Title 18, United States Code. In addition to investigating the distribution of obscene materials, the Grand Jury may properly investigate the existence of a conspiracy to distribute such materials.

He further states:

> The determination of the obscenity of materials is not limited to an examination of the materials themselves. It is equally relevant to that determination that those publishing and distributing questioned materials are engaged in conduct which constitutes the "sordid business of pandering." Ginzburg v. United States (1966) 383 U. S. 463; Mishkin v. United States (1966) 383 U. S. 502. The circumstances surrounding the production, sale and publicizing of questioned materials are as important to the Grand Jury in determining the obscenity of materials as is an understanding of the constitutional tests set forth in Roth v. United States (1957) 354 U. S. 476.

This indication of the likely course of the inquiry though it does not foreclose the Grand Jury pursuing other lines of inquiry, is presently helpful in ruling on Sturman's application to quash or modify the grand jury subpenas which have been issued. *Ginzburg* and *Mishkin* references accordingly will provide criteria in making a determination of the present application. Significantly, the *Redrup* per curiam of May 8, 1967 stated that in none of the cases under consideration "was there evidence of the sort of 'pandering' which the court found significant in *Ginzburg*."

So then I cite the criteria from these two cases that I think become important here:

(1) *Ginzburg* at 465:

> In the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question. In the present case, however, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene. We agree that the question of obscenity may include consideration of the setting in which publications were presented as an aid to determining the question of obscenity, • • •
>
> As in *Mishkin* v. *New York* • • • we view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal.

(2) *Ginzburg*, at 467:

> Besides testimony as to the merit of the material, there was abundant evidence to show that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering—"the business of purveying textual or graphic matter openly

advertised to appeal to the erotic interest of their customers." (Roth v. United States, supra, 354 U. S., at 495-496 (Warren, C. J., concurring).)

(3) *Ginzburg*, at 468:

The "leer of the sensualist" also permeates the advertising for the three publications. The circulars sent for EROS and Liaison stressed the sexual candor of the respective publications, and openly boasted that the publishers would take full advantage of what they regarded as an unrestricted license allowed by law in the expression of sex and sexual matters.

(4) *Ginzburg*, at 474:

We perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test.

(5) *Ginzburg*, at 474:

No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed but do not hold cannot themselves be adjudged obscene in the abstract; to sanction consideration of this fact might indeed induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.

Mishkin, at 508:

Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals

to the prurient interest in sex of the members of that group.

It is contended—and an affidavit is tendered to the effect—that the subpenas presently before the Court involve the production of virtually "all papers" pertaining to approximately 2,700 individual books and magazines between June, 1964 and June, 1967, a three-year period. It is said that the production of the ledgers, account receivables, and other records in this category, would prevent further distribution of books and magazines. It is urged that compliance with the subpena would constitute prior restraint. It is noted that *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963) declares "Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity."

In *Hale* v. *Henkel, supra,* the order of production was found to be unreasonable because, if enforced, it would completely put a stop to the business of that company. In addition to the possible unreasonableness of any order to produce materials, generally proscribed under the fourth amendment, surely serious attention must be given to any resulting prior restraint, concomitant but none the less real, which would offend the first amendment guarantee of free expression of ideas. However, it is concluded that the present record does not warrant or permit the complete quashing of the subpenae. With certain exceptions hereafter to be noted the subject matter of the subpenae is determined to be reasonably relevant to the contemplated inquiry, reasonably limited in time, and sufficiently particularized in description of the materials sought.

I proceed then to the order:

Subpena Categories 1, 2, 4, 8, 11, 12, and 14 may provide information and facts relevant under one or more

of the Ginzburg and Mishkin criteria, or verification of such information.

Subpena Categories 5 and 6 may provide the names of possible witnesses or possible participants in joint activities conceivably involving a conspiracy to violate a federal law.

Subpena Categories 7 and 13 may provide relevant names for possible witnesses. However, 13 will be limited to names of previous or present employees. Any other payroll record information need not be disclosed.

Categories 3, 9, and 10 are denied. None of these, on the present record, is deemed relevant or likely to lead to relevant information.

As to the order of modification to be entered, it is further ordered:

(1) With reference to all materials ordered to be disclosed it may be produced separately for each of the years involved. The year beginning June 1, 1964 shall first be produced. At subsequent reasonable intervals thereafter the materials for the year beginning June 1, 1965 and June 1, 1966 may be produced.

(2) Any witness who has been subpenaed may comply with the subpena by designating a proper custodian of the said records and materials within its possession and/or control, which custodian shall produce and deliver such records or other materials to the office of the United States Attorney for the Northern District of Ohio, for inspection and examination by the Grand Jury. However, by agreement of the parties, it shall not be necessary to convene a session of the Grand Jury to obtain said delivery and inspection by the office of the United States Attorney.

(3) No witness so appearing if before the U. S. District Attorney will be subject to interrogation other than for the purpose of identifying the records produced.

(4) Any original corporate books and records, if detained by the Government for any period longer than two weeks, shall be duplicated, and a true copy thereof made by the Government, and returned to the witness.

Order Re: Grand Jury Subpoenae

(Filed July 28, 1967.)

This matter came on before the court on July 13 and 20, 1967 upon the Application of Reuben Sturman for Alternative Orders Re Grand Jury Subpoenae, certain exhibits, statements, arguments and briefs of counsel, and after due consideration, the court rendered an oral opinion including rulings and orders.

It Is Therefore Ordered That,

(1) The subpoenae shall apply to Royal News Company, Paperback Stores, Inc., World Wide News Company, Cuyahoga News Company, Imperial News Company; but shall not apply to Discount Book Store, Inc., Majestic News Company, Spot Discount Stores, Inc., and Crown News Company.

(2) The corporations found subject to the subpoenae shall produce the documents specified in subpoenae categories 1, 2, 4, 5, 6, 7, 8, 11, 12 and 14. As to subpoena category 13, said corporations are required to disclose the names of previous or present employees contained in said payroll records, but otherwise the information contained therein need not be disclosed.

(3) Requests for documents in subpoena categories 3, 9, and 10 are denied.

(4) With reference to all materials ordered to be disclosed it may be produced separately for each of the years involved. The year beginning June 1, 1964 shall be first produced. At subsequent reasonable intervals thereafter

the materials for the year beginning June 1, 1965 and June 1, 1966 may be produced.

(5) Any witness who has been subpoenaed may comply with the subpoena by designating a proper custodian of the said records and materials within its possession and/or control, which custodian shall produce and deliver such records or other materials to the office of the United States Attorney for the Northern District of Ohio, for inspection and examination by the Grand Jury. However, by agreement of the parties, it shall not be necessary to convene a session of the Grand Jury to obtain said delivery and inspection by the office of the United States Attorney.

(6) No witness so appearing if before the U. S. District Attorney will be subject to interrogation other than for the purpose of identifying the records produced.

(7) Any original corporate books and records, if detained by the Government for any period longer than two weeks, shall be duplicated, and a true copy thereof made by the Government, and returned to the witness.

/s/ WILLIAM K. THOMAS
United States District Judge.